IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 2008 Session

HOWELL ANDERSON d/b/a ANDERSON TRUSS v. SEQUATCHIE COUNTY, ET AL.

Appeal from the Circuit Court for Sequatchie County
No. 6100 Buddy D. Perry, Judge

No. M2007-02542-COA-R3-CV - Filed September 24, 2008

The plaintiff appeals a jury verdict finding that he failed to fulfill a condition in a conditional sales contract that would have required Sequatchie County to convey a parcel of property to him. The County appeals the trial court's suggestion of additur that would award plaintiff interest on the purchase price the County attempted to reimburse plaintiff. We affirm the jury verdict but reverse the additur.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

William W. Burton, Murfreesboro, Tennessee, for the appellant, Howell Anderson, d/b/a Anderson Truss Company.

L. Thomas Austin, Dunlap, Tennessee, for the appellee, Sequatchie County; Joe A. Conner, for the appellees, Galloway Enterprises, Inc., and George Galloway.

MEMORANDUM OPINION[1]

This appeal arises from a jury verdict in 1997 which found that Sequatchie County ("County") did not breach a conditional sales contract ("Contract") to sell property for $12,000 to Howell Anderson.[2] The Contract at issue was entered into by the parties in August of 1987.

The 1987 Contract required Sequatchie County ("County") to sell Mr. Anderson 3.832 acres ("parcel") for $12,000. Possession of the property passed to Mr. Anderson upon execution of the Contract and payment of $12,000 to the County. The County, however, was not obligated to convey title to the parcel to Mr. Anderson unless within one year after contract execution Mr. Anderson was operating a wood truss manufacturing business on the parcel. If not so used, then the Contract required the County to return the $12,000 purchase price and the parties had no further obligation under the Contract. It appears that the County was using this land transaction to encourage business development.

Believing that Mr. Anderson failed to comply with the Contract, the County did not convey title to the parcel to Mr. Anderson and unsuccessfully attempted to return to Mr. Anderson the $12,000 purchase price. In April of 1991, the County Executive issued a check to Mr. Anderson for $12,000 with a formal letter notifying him that he had failed to meet the Contract conditions. Although he received it, Mr. Anderson never cashed the check.[3] The County then later conveyed the parcel to Galloway Enterprises, Inc. ("Galloway").

In 1993, Mr. Anderson sued the County and Galloway claiming that the County had breached the Contract and that Galloway had knowingly interfered with his contractual rights. As relief, Mr. Anderson asked that the deed to Galloway be voided and the parcel be conveyed to him. In addition, Mr. Anderson sought to recover from the County and Galloway for personal property located on the parcel that Mr. Anderson alleged the defendants wrongfully destroyed or appropriated for their use. Galloway filed a cross-claim against County.

The claim of Mr. Anderson against the defendants was tried before a jury in 1997. The cross-claim by Galloway was to be tried separately. The jury found that Mr. Anderson had not met the condition of the Contract regarding use of the property and that the County did not breach the

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[1] Tenn. R. Ct. App. 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

[2] Mr. Anderson was doing business at the time as Anderson Truss Company ("Company").

[3] The one-year period described in the Contract had expired in 1988. The cause and effect of the County waiting until 1991 to return the payment is not at issue on appeal.

Contract. With regard to the personal property claim by Mr. Anderson, the jury found that Mr. Anderson had abandoned the property at issue and, therefore, neither defendant was responsible for any damages arising from its disposal.

In its Final Order of Dismissal, the trial court ordered Mr. Anderson's claims against the County and Galloway to be dismissed and found that Mr. Anderson was entitled to nothing except return of the $12,000 purchase price as contemplated in the Contract. The fact that Mr. Anderson was entitled to return of the $12,000 purchase price was acknowledged and had never been disputed by the County. Indeed, the County had sent him a check for that amount.

Mr. Anderson filed a motion for a new trial on the grounds that the verdict was against the weight of the evidence, that the jury instruction on the one-year contract requirement was misleading, and that he was entitled to interest on the $12,000 purchase price held by the County.

The trial court entered its order on Mr. Anderson's motion for a new trial on August 21, 1997. The trial court denied Mr. Anderson's motion with the following suggestion of additur:

> It is therefore ORDERED, ADJUDGED AND DECREED that the jury verdict will stand except Howell Anderson shall have a judgment against Sequatchie County for $12,000.00 plus ten percent (10%) interest since April 24, 1991, and Defendant Sequatchie County shall have thirty (30) days to accept the addition, or a new trial shall be granted. The Defendant Sequatchie County may make such additur under protest, and appeal from the action of the trial judge to the court of appeals.

Under protest, the County accepted the additur of interest. Both parties then filed a notice of appeal. This court dismissed the parties' appeal in 1998 since the trial court had not entered a final order on the additur and the cross-claim of Galloway remained unresolved.

Apparently, this case was dormant for nine years until September of 2007, when Galloway voluntarily dismissed its cross-claim against the County without prejudice. The trial court then entered a final order *nunc pro tunc* on October 30, 2007 making the same additur finding of 10% interest on $12,000 since April 24, 1991, which the County accepted under protest.

The parties then filed this appeal. Mr. Anderson appeals claiming that the verdict was against the weight of the evidence and that the jury instructions on the one-year condition in the Contract were confusing and insufficient. In addition to the additur suggested by the trial court, Mr. Anderson also claims he is entitled to interest on the $12,000 for a larger period than the trial court included in the additur, beginning in August of 1988 when the one-year Contract period expired. The County appeals claiming that the award of interest by the trial court was improper since the County attempted to return the $12,000 to Mr. Anderson in 1991.

I. VERDICT CONTRARY TO THE WEIGHT OF THE EVIDENCE

First, Mr. Anderson argues that the evidence does not support the finding that he failed to comply with the Contract, *i.e.*, operate a wood truss manufacturing business on the parcel within the one-year period. The Supreme Court in *Whaley v. Perkins*, 197 S.W.3d 665 (Tenn. 2006), discussed the applicable standard of review of jury verdict as follows:

> The applicable standard of review is set out in Tennessee Rule of Appellate Procedure 13(d), which provides, "[f]indings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Discussing that standard of review, we have stated:
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> > When addressing whether there is material evidence to support a verdict, an appellate court shall: (1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence. *Crabtree Masonry Co. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978); *Black v. Quinn*, 646 S.W.2d 437, 439-40 (Tenn. App. 1982). Appellate courts shall neither reweigh the evidence nor decide where the preponderance of the evidence lies. If the record contains "any material evidence to support the verdict, [the jury's findings] must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury. *Crabtree Masonry Co.*, 575 S.W.2d at 5.

197 S.W.3d at 671.

Mr. Anderson provides citations to evidence in the record he asserts shows a litany of things ostensibly done to prepare to manufacture trusses on the property. The County, however, introduced evidence that between September 1987 and August 1988 very little electricity was used on the site and the site never had water or sewer connections. The County Executive testified that he drove by the parcel every day on his way to and from work and never saw any operation of a wood truss business. Employing the applicable standard, we find that there is material evidence to support the jury's verdict, and it is affirmed.

II. CONFUSING JURY INSTRUCTIONS

Second, Mr. Anderson argues that the trial court gave an erroneous instruction when it told the jury Mr. Anderson's business had to be in "full operation" during the one-year period. Regarding appellate review of jury instructions,

> It is the rule in Tennessee that "[i]nstructions should not contain inaccurate or inapplicable statements of legal principles that might tend to confuse the jury." *Ingram v. Earthman*, 993 S.W.2d 611, 636 (Tenn. Ct. App. 1998). Reversal is only warranted, however, if the trial court's error "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b). "An erroneous instruction will not necessarily be considered reversible error if the trial court later explains or corrects the instruction or if the trial court adequately explains the issues in the case in other portions of its charge." *Ingram*, 993 S.W.2d at 636. Whether a jury has been properly instructed and whether an error in instruction more probably than not affected the jury's verdict are questions of law that are reviewed de novo with no presumption of correctness. *See Whaley v. Perkins*, 197 S.W.3d 665, 672 (Tenn. 2006).

Troup v. Fischer Steel Corp., 236 S.W.3d 143, 149 (Tenn. 2007).

The Contract provided that the County would convey the parcel to Mr. Anderson "one (1) year from the date of this agreement, conditioned upon the Buyer's business of manufacturing wood trusses being in operation at that time." If the business "is not in operation within one (1) year," the purchase price shall be returned to Mr. Anderson and the County is released from further obligation.

Mr. Anderson complains that the trial court required "full operation" in its instruction. The trial court, however, immediately made the following correction:

> Ladies and gentlemen, Counsel pointed out to me that I may have said full operation when referring to the operation of the business. If I did that, that was incorrect. The contract reads as it reads, if it reads, and y'all will have an opportunity to look at that. But if I characterized it as full operation, that was incorrect on my part. What's applicable is the language of the contract itself, not what I said.

Consequently, even if it were error to require "full operation" in order for the condition to be met, the trial court promptly and clearly corrected is mistake. This correction was acknowledged by plaintiff's counsel at trial. Consequently, we find no reversible error in the jury instructions.

III. REMITTITUR

The County argues that the trial court erred when it suggested an additur that would award Mr. Anderson interest on the $12,000 payment held by the County in April of 1991, because the County formally notified Mr. Anderson that the condition had not been met and sent him a check for $12,000. Since the County sent him a check, while he did not cash it, the County argues that Mr. Anderson chose not to have benefit of the money available to him. The period of interest awarded by the trial court upon the suggestion of additur began in April 1991 when the County gave Mr. Anderson formal notice that he had not complied with the condition and sent him a check for $12,000.

The trial court in the matter availed itself of the additur provision in Tenn. Code Ann. § 20-10-101 which provides as follows:

> (a)(1) In cases where, in the opinion of the trial judge a jury verdict is not adequate to compensate the plaintiff or plaintiffs in compensatory damages or punitive damages, the trial judge may suggest an additur in such amount or amounts as he deems proper to the compensatory or punitive damages awarded by the jury, or both such classes of damages.
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> (2) If such additur is accepted by the defense, it shall then be ordered by the trial judge and become the verdict, and if not accepted, the trial judge shall grant the plaintiff's motion for a new trial because of the inadequacy of the verdict upon proper motion being made by the plaintiff.
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> (b)(1) In all jury trials had in civil actions, after the verdict has been rendered, and on motion for a new trial, when the trial judge is of the opinion that the verdict in favor of a party should be increased, and an additur is suggested by him on that account, with the proviso that in case the party against whom the verdict has been rendered refuses to make the additur a new trial will be awarded, the party against whom such verdict has been rendered may make such additur under protest, and appeal from the action of the trial judge to the court of appeals.
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> (2) The court of appeals shall review the action of the trial court suggesting an additur using the standard of review provided for in Rule 13(d) of the Tennessee Rules of Appellate Procedure applicable to decisions of the trial court sitting without a jury. If the court of appeals is of the opinion that the verdict of the jury should not have been increased or that the amount of the additur is improper, but that the judgment of the trial court is correct in all other respects, the case shall be reversed to that extent, and the court of appeals may order remitted all or any part of the additur.

In reviewing decisions by trial courts to suggest adjustments such as additurs, the role of the appellate court is well-settled:

> The appellate court customarily conducts a three-step review of a trial court's adjustment of a jury's damage award. First, we examine the reasons for the trial court's action because adjustments are proper only when the court disagrees with the amount of the verdict. *Burlison v. Rose*, 701 S.W.2d 609, 611 (Tenn. 1985); *Palanki ex rel. Palanki v. Vanderbilt Univ.*, 215 S.W.3d 380, 385 (Tenn. Ct. App. 2006). Second, we examine the amount of the suggested adjustment because adjustments that "totally destroy" the jury's verdict are impermissible. *Foster v. Amcon Int'l, Inc.*, 621 S.W.2d 142, 148 (Tenn. 1981); *Bain v. Simpson*, No. M2001-00088-COA-R3-CV, 2002 WL 3600320, at *3 (Tenn. Ct. App. Mar. 7, 2002) (No Tenn. R. App.

> P. 11 application filed); *Guess v. Maury*, 726 S.W.2d 906, 913 (Tenn. Ct. App. 1986). Third, we review the proof of damages to determine whether the evidence preponderates against the trial court's adjustment. *Myers v. Myers*, No. E2004-02135-COA-R3-CV, 2005 WL 1521952, at *3 (Tenn. Ct. App. June 27, 2005) (No Tenn. R. App. P. 11 application filed); *Long v. Mattingly*, 797 S.W.2d 889, 896 (Tenn. Ct. App. 1990).

Hindman v. Doe, 241 S.W.3d 464, 471 (Tenn. Ct. App. 2007).

In the case before us, the verdict form[4] presented to the jury asked the following three paraphrased questions:

1. Did the Plaintiff, Howell Anderson, meet all the conditions of his contract?
   If yes - go to question 2.
   If no - skip to question 3.

2. Did Sequatchie County breach its contract with the Plaintiff, Howell Anderson?
   If yes - then is Anderson entitled to any interest on the $12,000 he paid the County?

3. Did Howell Anderson abandon the personal property on the site?
   If yes - proceed no further.

Using this verdict form, the jury found that Mr. Anderson did not meet the conditions of his Contract, that the County did not breach the Contract, and that Mr. Anderson abandoned the personal property. The jury was not presented with the issue of whether Mr. Anderson was, in spite of the lack of breach by the County, entitled to interest on the $12,000. The record shows that Mr. Anderson's counsel stated he had no objections to the jury verdict form.

Thus, the jury was given a jury verdict form that allowed an award of interest on the $12,000 payment only if the County was found to be in breach. During deliberations, the jury sent a note to the court asking whether they could award Mr. Anderson interest on his $12,000 if they found that the County did not breach the Contract, specifying that "we all agree that he is [entitled to interest]." After discussion with counsel, the trial court responded that the jury should "go through and answer the questions" on the jury form. The trial court discussed with counsel the fact that the jury verdict form gave the jury no option to award Mr. Anderson interest absent a finding of breach by the County. After discussion with the trial court, Mr. Anderson's counsel agreed to the response that was given to the jury.

[4] The actual jury verdict form is not in the record but in the transcript of the trial. The trial court read it into the record.

In this appeal, Mr. Anderson argues that the trial court erred when it failed to allow the jury to award interest on the $12,000 payment. This assertion must be interpreted as a challenge to the jury verdict form. As set out earlier, there was no objection to the form used. Further, the form was consistent with applicable legal principles. Absent a breach by the County, Mr. Anderson was not entitled to any damages. The $12,000 was to be repaid to Mr. Anderson under the terms of the original contract governing the sale. Thus, it was not damages for breach. The County had tried to return the money to Mr. Anderson, but he had refused it, choosing instead to insist on transfer of title. The date of that attempted return coincides with the beginning point of the interest ordered by the trial court. We have found no other cause of action alleged in the complaint under which the County could have been liable for interest on the money.

Since the jury was not presented with the option to award Mr. Anderson interest on the $12,000 payment, which decision we conclude was correct, the trial court erred in suggesting an additur of that interest. In order for a trial court to suggest an additur, the issue must have been at some point presented to the jury as being in dispute.

Additionally, as discussed earlier, we are unaware of any theory or cause of action asserted in this case that would entitle Mr. Anderson to an award of interest. Consequently, the award of interest on the $12,000 repayment is reversed.

The jury verdict is affirmed and the award of interest to Mr. Anderson on the $12,000 payment by suggestion of additur is reversed. Costs of this appeal are charged to Howell Anderson for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.